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No. 06-1688

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IN THE

Supreme Court of the United States

G. MARK JENKINS, M.D.,

Petitioner,

v.

METHODIST HOSPITALS OF DALLAS, INC.; HOWARD CHASE; JOHN HAUPERT; JACK BARNETT; KELLY WOLFE; TIM MEEKS; and KIM HOLLON,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Did petitioner Dr. G. Mark Jenkins present evidence from which a reasonable jury could find that respondent Methodist Hospitals of Dallas, Inc.'s temporary suspension of his privileges to practice in one portion of the hospital was based on his African-American race?

STATEMENT PURSUANT TO RULE 29.6

Respondent, Methodist Hospitals of Dallas, Inc., has no parent corporation and no publicly held company owns 10% or more of its stock.

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REASONS FOR DENYING THE PETITION

I. THE PETITION IS BASED ON A LARGELY FICTIONAL ACCOUNT OF THE EVIDENCE.

Jenkins takes too far the requirement that in considering summary judgment or judgment as a matter of law "the court must draw all reasonable inferences in favor of the nonmoving party." *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 150-51 (2000). Indeed, Methodist[1] chose to respond to Jenkins's petition rather than submit a waiver mainly to object to — and prevent the Court from being misled by — the pervasive misstatements and omissions about the record in the petition.[2] Pursuant to Supreme Court Rule 15.2, those misstatements are as follows.

A. Misleading Statements Concerning Barnett and the Suspension.

Beginning on the "Questions Presented" page of his petition, Jenkins makes repeated statements about Dr. Jack Barnett's involvement in the decision to suspend Jenkins's cath-lab privileges. Among other things, Jenkins (i) accuses Barnett of being "principally responsible" for the suspension, *Pet.* at i, 7; (ii) states that Barnett "orchestrated the events" leading to the suspension, *Pet.* at 5; (iii) alleges that "due principally to the efforts of . . . Barnett," the hospital

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1. This brief is submitted by all of the respondents, but for convenience the brief will refer to all of the respondents simply as "Methodist."

2. Jenkins's footnote 2 about the pendency of Methodist's motion for attorney's fees appears to be offered only to invoke prejudice toward Methodist. It has no relevance to the issues in the petition.

suspended his cath-lab privileges, *Pet.* at 3; (iv) asserts that Barnett "aggressively promoted" the suspension, *Pet.* at 6; (v) accuses Barnett of playing a "key role" in every stage of the proceedings against him, *Pet.* at 6; (vi) says that Barnett "became an advocate" before the Methodist Corporate Medical Board ("CMB"), which officially effected the suspension, *Pet.* at 6; (vii) accuses Barnett "and another codefendant" of providing "false information" about him to the other 11 members of the CMB before they voted on the suspension, *Pet.* at 7; and (viii) claims that Barnett played a "leading role" in the suspension, *Pet.* at 16. Those statements — which are the foundation of most of Jenkins's argument for granting the petition — are without record support, as are a number of other statements Jenkins makes about Barnett and the suspension.

1. Barnett's role with the hospital. Jenkins describes Barnett as a "manager," a "hospital manager," and a "managerial employee" who acted for "hospital management." *Pet.* at i, 3, 7. In fact, however, Barnett (as opposed to some of the other individual defendants) did *not* manage Methodist. Barnett was a member of Methodist's medical staff and as part of that staff was the Chairman of the Department of Medicine, and he also ran the internal medicine residency program for infection control. D-App.-100, 243. The "medical staff" consists of the physicians granted medical staff appointments and privileges to practice medicine at Methodist. D-App.-75. They organize themselves and are governed by the Medical Staff Bylaws. *Id.* at 73. The CMB is the governing board of the Methodist medical staff. *Id.* at 75. The medical staff is separate from Methodist's management. *See, e.g., id.* As Chairman of the Department of Medicine, Barnett was a part of the medical staff. But there is no evidence that he was, or that he dealt with Jenkins in any capacity as, a "manager" of Methodist.

2. *Decision to form the AHC.* The evidence shows that on July 12, 2000, Pam Daniel (the Administrative Director of the Cardiology Department at Methodist), Tim Meeks (Human Resources Vice President for Methodist), and John Haupert (Associate Executive Director for Methodist with newly assigned responsibility for the cardiology area) attended a regularly scheduled meeting of the cath-lab staff in order to hear directly the staff's complaints about Jenkins. D-App.-66-68, 265-267, 271-271. Kim Hollon (Executive Vice President of Methodist) then requested a meeting between himself, Haupert, Dr. Robert Edmonson (the Director of Cardiology and head of the North Texas Cardiovascular Associates ("NTCA"), Jenkins's medical group), and Barnett (as Chairman of the Department of Medicine, of which the Cardiology Department is a part). D-App.-54, 66-68, 247-250, 276, 292-294. At the meeting, Edmonson at the very least agreed with, if he did not himself propose, formation of an ad hoc committee ("AHC") to address the complaints about Jenkins that Methodist had received. D-App.-247-250, 276, 292-294.

After being notified by Barnett of the request for corrective action as required by the Medical Staff Bylaws, D-App.-96, 250, Dr. Kirk Lipscomb (Chair of the CMB) submitted a written memorandum to Barnett, D-App.-97. The memorandum directed Barnett to appoint an AHC "to study the matter concerning the professional conduct of Dr. Jenkins and to extend an opportunity to Dr. Jenkins to discuss concerns which led to this action." *Id.* The memorandum also stated that the AHC will be responsible for reporting its investigation to the CMB within 30 days. *Id.*

3. Composition of the AHC. Barnett, as he was requested by Lipscomb and required to do under the Medical Staff Bylaws[3] given his position as Chairman of the Department of Medicine, D-App.-77, 97, chose the five-member AHC, D-App.-251. But his selections do not support any inference that he was principally responsible for their recommendation against Jenkins. To the contrary, Barnett chose a diverse group of leaders from the medical staff, including Dr. Darrell Thigpen (an African-American who was then President of the Methodist medical staff); Dr. Arturo Aviles (a Hispanic doctor); Dr. Freda Levy and Dr. Leigh Hunter (two female doctors); and Dr. Karl Brinker (a doctor who had enthusiastically backed Jenkins's appointment to the staff and who was particularly concerned with attracting and retaining more African-American doctors for Methodist). D-App.-50-51, 251, 296-297. Brinker chaired the committee. D-App.-162. The deck was not stacked against Jenkins from the start as he would have the Court to believe.

4. Decision of the AHC. Despite agreeing with (if not suggesting) the formation of an AHC, Edmonson signed an affidavit during this litigation stating that, during the initial meeting about the formation of the AHC, Barnett said that

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3. Methodist's Medical Staff Bylaws govern the peer-review process. D-App.-69-95. According to Section 7.1.1(1), which governs corrective action, whenever the activities or professional conduct of any practitioner with clinical privileges are considered to be lower than the standards or aims of the medical staff or to be disruptive to the operations of the hospital, corrective action against such practitioner may be requested. D-App.-77. Upon receipt of a request for corrective action that could result in a reduction or suspension of clinical privileges or a suspension or expulsion from the medical staff, the CMB shall forward the request to the chairman of the department in which a practitioner has privileges and direct the chairman to appoint a departmental AHC to investigate the matter. *Id.*

Jenkins should be suspended without further review. P-App.-654. But there was no suspension implemented at that time and the recommendation was to begin the peer-review process. *Id.* An AHC was ultimately formed before the suspension was implemented not by the AHC but by the CMB. P-App.-531-536. Edmonson was *not* a member of the AHC (or the CMB) or otherwise involved in the decision to suspend Jenkins's privileges, and Jenkins has no evidence from any AHC (or CMB) member who was involved that Barnett ever advocated suspension to them. P-App.-532-548.

Jenkins likewise has no evidence from any AHC member that Barnett provided inaccurate or misleading information to them. P-App.-1-724. Nor is there any evidence that Barnett attended the AHC interviews, influenced any testimony before the AHC, advocated suspension or termination to the AHC, or influenced the AHC recommendation. P-App.-352-470, 530. Indeed, Jenkins's unsupported argument that the AHC based its recommendation on information from Barnett contradicts his argument in response to Methodist's summary-judgment motion where he criticized the AHC for basing its decision "*exclusively* on Mr. Haupert's report of his July 12, 2000 meeting with the cath lab staff" and the four employees and three physicians it had interviewed.[4]

In his petition, Jenkins asserts — again without record support — that, after the AHC "failed to recommend immediate suspension, Dr. Barnett became an advocate before the [CMB]." *Pet.* at 6. That assertion is misleading. It is true that the AHC did not recommend suspension but that is because it recommended something more severe — termination of privileges — based on the view that Jenkins

4. Plaintiff's Response in Opposition to Defendants' Motion for Summary Judgment at 14 (emphasis added).

bore a large part of the responsibility for the hostile environment in the cath-lab, that Jenkins did not acknowledge his responsibility, and that the situation was not correctable. D-App.-162, 314-315.

5. Barnett's involvement in the CMB's suspension decision. Jenkins is simply wrong when he repeatedly says and implies that Barnett is the reason he was suspended. The actual evidence is to the contrary, even taking into account inferences in Jenkins's favor. Indeed, the CMB minutes are the only evidence Jenkins cites for what allegedly happened during the meeting (aside from the citation of a meaningless affidavit of a CMB member not present during the meeting as discussed in the section below). Those minutes do not reflect Barnett being the driving force (or any kind of force) behind the decision.

First, there is no evidence to support Jenkins's contentions that Barnett advocated suspension to the CMB and provided false information to the CMB. Although Barnett was a member of the CMB, it is undisputed that the Chair of the CMB (Dr. Kirk Lipscomb) was a member of Jenkins's medical group, NTCA. D-App.-97; P-App.-432-470, 532-543. And unlike most cases involving decisions to suspend employees, the decisional process here was recorded in the CMB minutes, which establish that Barnett did *not* serve as the CMB's primary source of information about Jenkins's problems, advocate or recommend to the other CMB members that Jenkins be suspended, or provide false information or otherwise influence them in any way. P-App.-532-543.

According to the CMB minutes, Barnett provided only the following information to the other CMB members:

> Dr. Lipscomb asked Dr. Barnett to give a report on the matter. Dr. Barnett reported that Administration had requested a meeting with him and Dr. Edmonson, the Cardiology Section Chief, following receipt of several complaints about Dr. Jenkins's behavior. At that meeting. Dr. Edmonson asked for an appointment to review and evaluate the situation in the cath lab and CCU [Critical Care Unit] that was the subject of the complaints(s). Dr. Barnett asked Mr. Haupert to give more details for the CMB's consideration.

P-App.-532. The CMB minutes do not otherwise reference Barnett providing *any* additional information to the other members, much less any false information. P-App.-532-536. And Barnett testified that he did not. D-Reply-App.-7-9. His testimony is corroborated by another CMB member who participated in the meeting. D-Reply-App.-18 ("My recollection of that meeting is, Dr. Barnett was very quiet."). Consequently, there is no evidence to support Jenkins's assertion that Barnett made any misrepresentations when reporting information to the CMB. *Id.*

The CMB minutes do reflect that Haupert provided additional information for the CMB's consideration. P-App.-532-533. In his petition, however, Jenkins states without record authority that Barnett and Haupert thereafter provided false information to the rest of the CMB. *See Pet.* at 7 ("Barnett and another codefendant [Haupert] provided false information about Dr. Jenkins to the Board before they voted."). There simply is no evidence to support Jenkins's

statement that Barnett (as opposed to Haupert) thereafter provided any information to the CMB, much less any false information. P-App.-532-536; *see also* D-Reply-App.-7 (referring to Haupert as the "principal source of information" at the CMB meeting).

Second, as an example of the "false information" allegedly provided by Haupert and Barnett, Jenkins complains in his petition that Shawn Tillman was the only witness Jenkins had specifically asked the AHC to interview, yet hers is the only testimony that was not transcribed. *Pet.* at 7, n.15. He further complains that "the incomplete transcripts then became the record that CMB members were urged to study before voting on what action to take against Dr. Jenkins." *Id.* Although Jenkins would like the Court to draw an adverse inference from the fact that Tillman's AHC interview was not transcribed, such an inference is not supported by the record. According to Thigpen (an African-American member of the AHC and the CMB who was then President of Methodist's medical staff), the AHC decided to interview Tillman at the last minute after interviewing Jenkins. D-App.-312-313. Because she was interviewed at the last minute, however, there was no court reporter available on the day of her interview, and therefore her testimony was not transcribed. *Id.* There is no evidence whatsoever that Barnett had anything to do with Tillman's testimony not being transcribed.

Relatedly, Jenkins says that Barnett and Haupert "falsely" summarized Tillman's testimony to the CMB, making it seem as though she testified adversely to Jenkins. *Pet.* at 7, n.15. But there is no evidence that Barnett (as opposed to Haupert) provided any information to the rest of the CMB concerning Tillman's testimony before the AHC. P-App.-532-533. And

the CMB minutes, upon which Jenkins relies to support his statement, summarize Tillman's testimony as follows: "Dr. Jenkins is not the only cardiologist who has difficulty working with the staff; but she could not disagree with anything reported as to Mr. Haupert." *Id.* at 533. This information is not false, as Jenkins asserts. *Compare* P-App.-533 (summarizing Tillman's testimony) *with* P-App.-618 (Tillman's affidavit from this litigation in which she states that "Dr. Jenkins is no more difficult to deal with than any other physicians I have worked with"; that "I was unaware of many of the situations discussed in the meeting, and I told John Haupert of this fact when he asked me about them"; and that "At the meeting, the ad hoc committee asked me about Dr. Jenkins's general behavior but I do not recall anyone asking me about any specific conduct or instances of patient endangerment.").

In sum, the 12 members of the CMB as a group, and not Barnett individually, made the decision Jenkins complains about in this lawsuit. P-App.-532-543. There is no evidence suggesting that Barnett provided any false information to the other 11 CMB members. P-App.-532-543. There is no evidence to support any inference that Barnett advocated or recommended suspension to the CMB, as Jenkins argues. To the contrary, the evidence shows that Barnett acted *only* in a ministerial capacity as he was required under the Medical Staff Bylaws to fulfill his responsibility as Chairman of the Department of Medicine. And there is no testimony from *any* member of the CMB — or *any* other evidence indicating — that Barnett exercised *any* leverage or influence over them. P-App.-532-543. The *only* inference to be drawn from the record is that the CMB members independently reviewed the AHC transcripts, assessed Jenkins's testimony firsthand, and drew their own conclusions about the action to take

concerning Jenkins. *See, e.g.*, D-Reply-App.-18. That undisputed evidence would not permit any reasonable jury to find that Barnett was principally responsible for the CMB's decision.

6. Fraga affidavit. Jenkins describes Dr. Mark Fraga "*as a member of the CMB who was present when the decision to summarily suspend was officially made*" and then points to Fraga's affidavit, which states that the CMB suspended Jenkins "with no effort to determine the accuracy of allegations." *Pet.* at 7 (emphasis added). But according to Fraga's own affidavit, he was *not* present when the CMB made its suspension decision. P-App.-644-645. That is because he did not become a member of the CMB until *after* Jenkins's privileges were suspended. P-App.-644. His testimony about the decisional process therefore is meaningless and certainly does not suggest that Barnett gave false information to the rest of the CMB or was principally responsible for their decision as Jenkins suggests.

7. Character assassination and name calling. Not satisfied with misrepresenting Barnett's role in the decisional process, Jenkins makes an all-out assault on Barnett's character. He (i) calls Barnett a "bigot" and "an intractable bigot" with a "long history of mistreating minority doctors" at the hospital; (ii) accuses Barnett of exhibiting "a pattern of conduct in which [he] employs racially charged language in the presence of minority doctors, insults them, and falsely accuses them"; (iii) accuses Barnett of having a "modus operandi" of acting negatively towards minorities in general; (iv) argues that "Dr. Barnett has mistreated minority doctors often enough for it to be considered habitual"; and (v) asserts that Barnett's "modus operandi" is to insult and falsely accuse minority physicians in order to cause them to leave the

hospital on their own and that he fell victim to "Dr. Barnett's preferred method of ridding his hospital of minority doctors." *Pet.* at 5-7, 16. Those are not facts; they are Jenkins's labels and conclusions. But they amount to no more than name-calling and character assassination. Even if Jenkins wanted to argue that the facts as he sees them would allow a jury to view Barnett as Jenkins describes him, by what legal principle would that be a permissible approach? It plainly is an argument that Barnett has a "bad" character and therefore acted "badly" in connection with Jenkins. That approach has long been rejected by the courts and the rules of evidence.

8. The nature of the suspension. Jenkins says that a "summary suspension is procedurally unique and susceptible to manipulation" compared to "other peer-review investigations, even those in which ultimate termination of hospital privileges is under consideration, [where] a full due-process hearing must precede any penalty." *Pet.* at 8. Likewise, he says the process was "bereft of procedural safeguards." *Pet.* at 10. Although he is correct that a summary suspension is *permitted* without prior notice or opportunity to be heard, that is not what happened here. Jenkins *was* given notice of the complaints and an opportunity to respond, both to the AHC before it voted to terminate his privileges, P-App.-529 and D-Reply-App.-188-292, and again before the CMB recommended the suspension, D-App.-163, 166-168.

9. The complaints about Jenkins. Jenkins understates the nature of the cath-lab complaints against him when he says they dealt only with his rude and brusque communication style and resulting hostile working environment. *Pet.* at 4. He also misses the mark when he criticizes the hospital allegedly failing "to identify a single patient whom he had ever endangered." *Id.* The evidence shows that cath-lab

complaints not only referenced a hostile working environment but also specifically included possible patient harm. D-App.-66-67. After investigating, the AHC concluded, moreover, that "there is a hostile environment in the cath lab, which is potentially injurious to patient care." D-App.-162. The CMB considered that conclusion in making its decisions. D-App.-165.

B. Jenkins's Description of Alleged Disparate Treatment.

Jenkins says he received "grossly disparate treatment . . . compared to other doctors similarly situated who were not black." *Pet.* at 8. The two doctors at issue are Dr. T and Dr. V,[5] both of whom had also been peer-reviewed for unprofessional conduct toward the staff. D-Reply-App.-60-100. Although Dr. T and Dr. V were peer-reviewed for similar reasons as Jenkins and were likewise given notice of the complaints and an opportunity to be heard as was Jenkins, *id.*, Jenkins now asserts he was treated "far more severely" and they were treated "more leniently" because their privileges were not suspended like his were. *Pet.* at 8. Jenkins makes impermissible leaps and omits critical undisputed facts concerning his disparate-treatment argument that result in a misleading presentation.

Unlike Jenkins, Dr. T did not deny that he had acted in the manner described in the complaint about him or deny his responsibility for creating the problems at issue when interviewed by his ad hoc committee. D-Reply-App.-63-67. In addition, the ad hoc committee that interviewed Dr. T and recommended corrective action was composed of completely

5. Because of confidentiality concerns, their full names were not provided during discovery.

different members than the AHC that investigated Jenkins. D-App.-162; D-Reply-App.-63. There is also no evidence that the corporate medical board that considered Dr. T was made up of the same members as the CMB that considered Jenkins. D-Reply-App.-65. Methodist also reported to the National Practitioner Data Bank ("NPDB") that Dr. T had resigned while under, or to avoid, investigation relating to his professional conduct and after corrective action had been recommended. D-Reply-App.-71.

With regard to Dr. V, Jenkins primarily complains because Dr. V received counseling before his formal corrective action and that his privileges were conditionally approved as opposed to being suspended. But the evidence shows that Jenkins also received the benefit of informal discussions (at least from NTCA member Edmonson) concerning staff complaints before formal corrective action was initiated. D-App.-265-266. And Jenkins's hospital privileges were also reapproved and extended. D-App.-62-63.

The decisionmakers involved concerning Dr. V, moreover, were entirely different than the decisionmakers involving Jenkins. For example, the Credentials Committee initially recommended that Dr. V's privileges be extended only 60 days pending further review by the Medicine Executive Committee. D-Reply-App.-80. The Medicine Executive Committee interviewed Dr. V and recommended, among other things, that he be reappointed for a probationary year and that he be required to meet certain conditions. *Id.* at 83-89. Because the probation was a form of corrective action, however, an ad hoc committee was formed to investigate the situation. *Id.* at 90-92. There is no evidence that the ad hoc committee that considered Dr. V was

comprised of the same AHC members that considered Jenkins. *Id.* In any event, Dr. V's ad hoc committee recommended non-renewal of privileges, *id.* at 92, just as Jenkins's AHC recommended termination of his privileges. When the Corporate Credentials Committee (not the CMB, which considered the AHC recommendation concerning Jenkins) considered the recommendation, they concluded that Dr. V's privileges should not be renewed. *Id.* at 99. Dr. V then requested that his application for reappointment be rescinded. *Id.* at 100.

In short, Methodist's treatment of Dr. T and Dr. V does not permit an inference of intentional discrimination.

Jenkins also states that he was treated more severely than other cardiologists. In support of his statement, he cites several affidavits. But they do not identify the cardiologists with whom Jenkins is attempting to compare himself, much less disclose whether the physicians are non-black and therefore outside the protected category. *See* P-App.-610-611 (Hunt affidavit), 622 (White affidavit), and 631-632 (Harrison affidavit). Furthermore, he has no evidence but only speculation to support his statements that these other cardiologists were never suspended, disciplined, or subject to peer-review investigation. Nor, most critically, does he have any evidence that Barnett was involved in reviewing their conduct or the conduct of anyone else he refers to when he says Methodist treated him in a "grossly disparate" manner "compared to nonblack hospital physicians similarly situated." *Pet.* at 18.

II. JENKINS'S ARGUMENTS ABOUT ALLEGED COMMENTS BEARING ON RACE ARE MISGUIDED.

Jenkins argues that the Fifth Circuit has — except in cases he deems acceptable because the plaintiff prevailed — persistently refused to follow this Court's decision in *Reeves* concerning the evidentiary value of alleged discriminatory comments. In particular, he repeatedly criticizes the Fifth Circuit's use of a four-part test for evaluating such comments[6] and claims that the test conflicts with *Reeves*, *Desert Palace*,[7] and decisions of other circuits. As shown below, there is no such conflict. But even if there were, this case plainly would not be the vehicle to resolve it.

A. Jenkins Waived His Attack on the Fifth Circuit's Approach to Evaluating Comments.

Despite strongly criticizing the Fifth Circuit's four-part test to evaluate allegedly discriminatory remarks" as "improperly restrictive"[8] and "peculiar,"[9] before the district court Jenkins not only failed to challenge the test, he embraced it. In his brief in response to Methodist's motion for summary judgment, Jenkins relied on the remarks he points to in his petition only as "direct evidence of racially

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6. *See Brown v. CSC Logic, Inc.*, 82 F.3d 651, 655-56 (5th Cir. 1996). The test Jenkins criticizes is traceable to Justice O'Connor's opinion in *Price Waterhouse v. Hopkins*, 490 U.S. 228, 277 (1989) (O'Connor, J., concurring), and circuit court cases predating *Hopkins*.

7. *Desert Palace, Inc. v. Costa*, 539 U.S. 90 (2003).

8. *Pet.* at 9.

9. *Id.* at 12, 13.

based discrimination" rather than as proof of discrimination through the indirect *McDonnell Douglas*[10] method of proof.[11]

More importantly, he actually relied on the very test he now attacks. He quoted a summary of the same four-part test he describes in his petition[12] and urged the district court that he prevailed under it.[13] He *never* advocated to the district court that the test conflicted with *Reeves* or otherwise was improper. Jenkins thus should not have been surprised that the district judge used that test in her summary-judgment ruling. *See Pet.* at B43-44. The Fifth Circuit declined to address the waiver issue expressly[14] but — again not surprisingly given Jenkins's arguments to the district court — cited the four-part test he criticizes. *Pet.* at A7-A8.

Having failed to complain of the test to the district court and instead affirmatively urging the application of it, Jenkins should not be heard to complain about the Fifth Circuit's approach, much less make it the focal point of his request

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10. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973).

11. Brief in Support of Plaintiff's Response in Opposition to Defendants' Motion for Summary Judgment ("*MSJ Resp. Brf.*") at 32.

12. *Compare Pet.* at 9-10 *with MSJ Resp. Brf.* at 32 ("Remarks may serve as sufficient evidence of discrimination if the offered comments are: (1) race related; (2) proximate in time; (3) made by an individual with authority over the employment decision at issue; and (4) related to the employment decision at issue.") (quoting *Van v. Anderson*, 199 F. Supp.2d 550 (N.D. Tex. 2002)). *Van* cites *Brown* as authority for its statement of the test. *Van*, 199 F. Supp.2d at 567.

13. *MSJ Resp. Brf.* at 32-34.

14. *See Brief of Appellees* at 43-44 (pointing out the waiver).

that the Court entertain the case. Jenkins's forfeiture below precludes this case from being an appropriate candidate to review the larger issue he raises in the petition.

B. Jenkins Misdescribes the Fifth Circuit's Opinion as Dealing with the Admissibility of Evidence.

In several places, Jenkins discusses the four-part test that is the centerpiece of his petition in terms of relevance and admissibility, subtly suggesting that the Fifth Circuit excluded from evidence the alleged remarks he points to. *See Pet.* at 9 (referring to the test as one "of relevance for so called 'stray remarks'"), 13 ("the Fifth Circuit raises the admissibility bar far beyond simple relevance"), 13 (the Fifth Circuit requires lower courts to "throw ... out" such remarks), 15 (remarks are "discarded as irrelevant"). The Fifth Circuit here did no such thing. This case is not about the exclusion of evidence. It is about whether the purported evidence Jenkins relies on, all of which was considered by the lower courts, is legally sufficient in this particular factual context to support a finding of race discrimination.

There is only one reason for Jenkins's mistaken approach. It appears first in his footnote 29. There he points to *Sprint/United Management v. Mendelson*, No. 06-1221, in which this Court granted a petition for writ of certiorari to decide questions concerning the admissibility of evidence in an employment-discrimination case. Jenkins obviously is trying to make the Court believe that the issues in this case are related to the issues in *Mendelson*. He expressly asks the Court to hold his petition pending the disposition in *Mendelson*. But his approach is all spin. No one sought exclusion from evidence of the alleged comments Jenkins relies on, and the district court did not exclude them. The

Court should reject Jenkins's transparent attempt to secure interest in his case by appending it to another case the Court has agreed to hear.

Methodist notes, however, that Jenkins's desired approach *does* significantly conflict with a Rule of Evidence. "Evidence of a person's character or a trait of character is not admissible for the purpose of proving action in conformity therewith on a particular occasion." FED. R. EVID. 404(a). Indeed, the problem is compounded given the recent amendment to the rule limiting the exceptions in Rule 404(a) to criminal cases. The comments to the 2006 amendment explain that "in a civil case evidence of a person's character is never admissible to prove that the person acted in conformity with the character trait." FED. R. EVID. 404 cmt. 2006 Amend. Rule 404(b) remains applicable to civil cases, but flatly prohibits the use of "other crimes, wrongs, or acts . . . to show action in conformity therewith." FED. R. EVID. 404(b). And as one scholar explains, none of the exceptions to that prohibition can legitimately be used in an employment-discrimination case.[15] In any event, admissibility is not the issue here, so the Court should not be drawn in by Jenkins pretending otherwise.

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15. *The Character of Discrimination Law: The Incompatibility of Rule 404 and Employment Discrimination Suits*, 114 Yale L.J. 1063 (2005) (pointing out that courts routinely violate Rule 404 and arguing for an employment-discrimination exception to the rule); *id.* at 1065 ("the effect of Rule 404 seems clear: It prohibits the plaintiff from admitting such evidence for the purpose of proving a propensity to discriminate"); *id.* at 1074-82 (explaining that the exceptions for "motive" and "intent" do not properly apply in employment-discrimination cases).

C. The Alleged Conflict with *Reeves* and Other Circuit Courts Does Not Support Review.

Jenkins's argument that the Fifth Circuit engaged in some egregious departure from this Court's ruling in *Reeves* about the evidentiary value of discriminatory remarks is based on a false premise. Specifically, the argument is grounded on his assertions that Barnett is "the hospital manager principally responsible for summarily suspending" him. *Pet.* at i. But as shown above, that assertion and the many others like it are false. *See supra* Part I.A. Given that no record evidence suggests that Barnett, although technically in a position to, did in fact make, direct, or exert influence over the decisions Jenkins challenges, the heart of Jenkins's entire argument fails. Without that asserted but factually incorrect premise, there is not even an arguable conflict with *Reeves* on the discriminatory remarks point. Accordingly, the Court should deny the petition.

Putting aside that problem, Jenkins is wrong to suggest that this Court prohibited circuit courts from evaluating alleged discriminatory remarks for their legal sufficiency and instead held that any alleged discriminatory remark makes the case a jury case regardless of the circumstances of the remark and the challenged decision. In *Reeves* the Court found that discriminatory remarks not made in the context of the plaintiff's discharge could be probative of age discrimination where the speaker (who was the plaintiff's supervisor) commented *to the plaintiff* that he "was so old [he] must have come over on the Mayflower" and told him that *he* "was too damn old to do [his] job." *Reeves*, 530 U.S. at 151. There are at least two reasons this case is different.

First, with respect to all but one of Barnett's[16] alleged remarks, none demonstrates any race-based bias in general, let alone race-based bias toward Jenkins, including (i) the alleged pre-1994 statement about why a Hispanic physician would think he would have the right to go to medical school; (ii) the alleged statement to an African-American physician that Barnett could teach a monkey to practice medicine the way that doctor practiced; (iii) the alleged statement about never getting rid of Jenkins; and (iv) the alleged statement by Barnett that he would not allow Jenkins to treat his dog.[17]

Second, Barnett's alleged reference to African-Americans as "gun-toting, drug pushing spooks" at some point between 1994 and 1999 does not save Jenkins's case.[18] That slur, if made, would unquestionably demonstrate race-based animus, but it does not constitute evidence that Jenkins's cath-lab privileges were suspended based on his race because it was not made to Jenkins, does not refer to him, and was not made in connection with the suspension decision. P-App.-637. *Reeves* does not stand for the proposition that an alleged racial remark can satisfy the plaintiff's burden to prove discrimination without at least one of those facts being shown. *Reeves* held that evidence of

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16. Jenkins briefly mentions alleged remarks by persons other than Barnett, but Methodist does not believe those mentions warrant a specific response.

17. The last alleged statement is the one to which Jenkins's trial lawyer improperly added the word "boy," leading to sanctions by the district court.

18. Although the Court must assume because of the procedural posture of the case that the comment was made, it should be noted that Barnett strongly denied making it.

statements to and about the plaintiff were legally sufficient even though they were not made in the context of the plaintiff's discharge. *Reeves*, 530 U.S. at 151. It did not hold that comments about others not made to the plaintiff were legally sufficient evidence even when not made in the context of the discharge. Jenkins simply reads *Reeves* too broadly.

Jenkins also presents his argument as though the lower courts engaged in a mechanical application of the four-part test he criticizes. In fact, both courts recited the test in one form or another, but they also explained that the statements were not such that a reasonable jury could find race discrimination in the decision Jenkins complains of based on them. *Pet.* at A7-A8, B43-44. It is only because Jenkins seeks to allow widespread speculation by juries about motives for challenged decisions that he is able to argue otherwise. That can be seen in his reliance on statements that may reflect dislike or distrust of Jenkins but have nothing to do with Jenkins's suspension or his race.

In any event, the other critical factor in *Reeves* — that the statements be by someone principally responsible for the decision — also is missing here, as explained above. For all of those reasons, there is no conflict between the Fifth Circuit's decision and *Reeves*.

Nor is there a conflict with other circuits. Jenkins's argument otherwise is hardly a serious effort at showing a circuit conflict. And there are obvious factual differences between this case and the cases Jenkins cites on pages 16 to 17 of his petition. Jenkins has pointed to no decision involving a factual pattern similar to this case where the court held there was sufficient evidence to support a finding of illegal discrimination.

In sum, there is no conflict between the Fifth Circuit's opinion here and either prior decisions of this Court or those of other circuits, and certainly there is no such conflict so significant as to warrant review by this Court.

III. JENKINS'S ARGUMENTS ABOUT HIS *PRIMA-FACIE* CASE AND OTHER CLAIMED EVIDENCE DO NOT WARRANT REVIEW.

Jenkins criticizes the lower courts for assuming that he proved a *prima-facie* case of discrimination and proceeding to analyze the last step of the *McDonnell-Douglas* method of proof. He suggests that the lower courts ignored his evidence of a *prima-facie* case despite the holding in *Reeves* that such evidence also is to be considered at the "pretext" stage of the analysis. He is wrong. Simply because the courts did not separately discuss his purported *prima-facie* case evidence does not, of course, mean they ignored it. Courts frequently, for the sake of efficiency, assume that certain threshold requirements are satisfied and go on to resolve cases on other issues. Surely *Reeves* did not prohibit that common practice.

Besides, Jenkins far overstates the strength of his *prima-facie* case. His evidence was exceedingly weak to the point that there is a substantial question whether Jenkins made out a *prima-facie* case at all. He points mostly to alleged facts that are critical of Methodist but do not show that its stated reasons for its actions are false (*e.g.*, the alleged "gratuitous severity" of the suspension). Relatedly, he offers opinions that obviously lack sufficient personal knowledge to be properly considered. *See* FED. R. EVID. 602, 701.

Jenkins also seems to argue that the decision of the fair hearing panel means that Methodist's stated reason for the suspension was pretextual. That approach misses the issue: the circuit courts agree that the issue in a discrimination case is not whether the defendant was correct or incorrect in its assessment of the plaintiff's conduct or performance and so challenging the factual accuracy of the underlying matter relied on by the defendant is wholly insufficient. *Pet.* at A9.[19]

And finally, Jenkins could point to no similarly situated physician who Methodist treated more favorably. His arguments otherwise ignore the meaning of "similarly situated." He has offered no evidence that the decisions about the others he points to were made by the same persons (or groups of persons) who made the suspension decision about him. It is well-settled among the circuit courts that persons are not similarly situated when different decisionmakers are involved.[20]

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19. *See, e.g., Swackhammer v. Sprint/United Management Co.*, ___ F.3d ___, 2007 WL 1969672, *4-*5 (10th Cir. July 9, 2007) ("Evidence that the employer should not have made the termination decision — for example, that the employer was mistaken or used poor business judgment — is not sufficient to show that the employer's explanation is unworthy of credibility."); *Helland v. South Bend Community School Corp.*, 93 F.3d 327, 330 (7th Cir. 1996) ("What matters here is not whether there is evidence contrary to that relied on by the School Corporation in deciding to remove Helland from the substitute list, but whether the School Corporation believed the information was correct."); *Moore v. Eli Lilly & Co.*, 990 F.2d 812, 816 (5th Cir. 1993) ("The fact that the employer's reasonable belief eventually proves to have been incorrect ... would not change the conclusion that the firing had been non-discriminatory.")

20. *See, e.g., Little v. Illinois Dep't of Revenue*, 369 F.3d 1007, 1012 (7th Cir. 2004) ("A similarly-situated employee must have been

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IV. OTHER REASONS TO DENY THE PETITION

Even accepting Jenkins's incorrect description of Barnett's role and the sufficiency of the alleged statements under *Reeves*, there are reasons to reject Jenkins's request for review. The enormous gulf Jenkins claims exists between *Reeves*'s and the Fifth Circuit's approaches for evaluating alleged discriminatory remarks involves employment-discrimination cases. This is not an employment case; Jenkins was not and does not claim to have been an employee of Methodist. It would be odd to use a non-employment case to resolve a purported significant and persistent refusal by a circuit court to properly analyze evidence in employment cases. So even if the Court thought there were such a refusal taking place, this case would not be the vehicle for addressing it.

In addition, the Court would have to make a significant assumption if it accepted this case. The Fifth Circuit has interpreted *Desert Palace* as effecting a change in the traditional *McDonnell-Douglas* three-step method of proving discrimination that allows a plaintiff to prevail through showing that a protected characteristic is only a "motivating factor" in

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(Cont'd)

disciplined, or not, by the same decisionmaker who imposed an adverse employment action on the plaintiff."); *Wyvill v. United Cos. Life Ins. Co.*, 212 F.3d 296, 305 (5th Cir. 2000) ("similarly situated" requirement not satisfied where plaintiff and co-worker held different jobs, had different performance problems, and "[m]ost importantly," were subject to different decisionmakers). *Accord Forrest v. Kraft Foods, Inc.*, 285 F.3d 688, 692 (8th Cir. 2002); *Radue v. Kimberly-Clark Corp.*, 219 F.3d 612, 618 (7th Cir. 2000) (quoting *Stanback v. Best Diversified Prods., Inc.*, 180 F.3d 903, 910 (8th Cir. 1999)); *Heyward v. Monroe*, 166 F.3d 332 (4th Cir. 1998).

the employment action at issue.[21] The lower courts here applied that standard, and no party objected to it. But there is a significant question whether *Desert Palace*, which was interpreting specific language in Title VII of the Civil Rights Act of 1964,[22] modifies the *McDonnell-Douglas* approach at all[23] or somehow applies to statutes that do not contain the language in Title VII that the Court was interpreting. Although Methodist did not find it necessary to object to the approach, the Court should be leery of taking a case where it would have to make such a tenuous assumption to resolve the questions presented.

Finally, this case also involves two dispositive issues that the Fifth Circuit did not reach. First, although 42 U.S.C. § 1981 prohibits race discrimination in the making and enforcing of contracts, Jenkins neither produced nor identified evidence of a contract that Methodist's conduct denied him the right to make or enforce. *See Brief of Appellees* at 18-25. Second, the actions

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21. *See Pet.* B40-41; *Rachid v. Jack in the Box, Inc.*, 376 F.3d 305, 312 (5th Cir. 2004) (modifying in an age-discrimination case the final step so that after a defendant offers a legitimate, nondiscriminatory reason for the employment action at issue, the plaintiff must show "either (1) that the defendant's reason is not true, but is instead a pretext for discrimination (pretext alternative); or (2) that the defendant's reason, while true, is only one of the reasons for its conduct and another 'motivating factor' is the plaintiff's protected characteristic (mixed motives alternative)").

22. *Desert Palace, Inc.*, 539 U.S. at 94-95 (interpreting 42 U.S.C. § 2000e-2(m)).

23. *See Raytheon Co. v. Hernandez*, 540 U.S. 44, 52 (2003) (if an employer states a legitimate, nondiscriminatory reason for the challenged decision, under *McDonnell Douglas* "the only remaining question would be whether respondent could produce sufficient evidence from which a jury could conclude that petitioner's stated reason for respondent's rejection was in fact pretext") (internal quotation omitted).

of Methodist that he complains about — a temporary suspension of part of his clinical privileges during a medical peer review, along with a legally required but later voided report of the suspension to the NPDB — are not cognizably "adverse" so as to support a § 1981 claim. *See Brief of Appellees* at 25-30.[24] Thus, deciding the issues Jenkins says warrant review would not come close to resolving this case. For that reason too, the Court should decline review.

CONCLUSION

The Court should deny the petition for writ of certiorari.

Respectfully submitted,

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24. This Court's decision in *Burlington Northern and Santa Fe Ry. Co. v. White*, 126 S. Ct. 2405 (2006), has no bearing on whether the alleged harm to Jenkins is cognizable as that decision is limited by its terms to the particular language in Title VII's retaliation provision.